

STATE OF INDIANA                     )  
  ) SS:  
COUNTY OF TIPPECANOE            )

BEFORE THE AREA BOARD OF ZONING  
APPEALS FOR TIPPECANOE COUNTY

CASE NO. BZA-1734

IN THE MATTER OF THE APPEAL OF  
BURKHART ADVERTISING, INC.

**FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

This matter is before the Area Board of Zoning Appeals for Tippecanoe County on the appeal of Burkhart Advertising, Inc. (hereinafter referred to as “Burkhart”) for an appeal of a decision of Ronald L. Highland, Tippecanoe County Building Commissioner (hereinafter referred to as “Building Commissioner”). After proper notice, and upon hearing argument and receiving testimony and evidence from Burkhart and the Building Commissioner, reviewing the record, considering the applicable laws and the Unified Zoning Ordinance of Tippecanoe County, and deliberating in open session, the Area Board of Zoning Appeals of Tippecanoe County, now makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. Some time prior to December 4, 2006, the Tippecanoe County Building Commission became aware that a billboard owned by Burkhart on the property located at 9519 US Highway 52 South, Lafayette, Indiana had been blown down in a windstorm.

2. On December 4, 2006, the Tippecanoe County Building Inspector (“Inspector”) visited that site of this billboard.

3. At the time of his visit on December 4, 2006, the Inspector took photographs of the remains of the billboard.

4. These photographs show that on December 4, 2006, the remains of the billboard consisted only of four (4) foundation poles, one (1) broken cross member attached to two (2) of the foundation poles, one (1) metal strip attached to all four (4) foundation poles, and the work platform.

5. These photographs also show that at least two (2) of the foundation poles were leaning far forward and very noticeably out of alignment with the other two (2) foundation poles.

6. These photographs also show that the work platform was slanting downward and very noticeably not level.

7. These photographs also show that the billboard face was blown off of the foundation poles, and the remains of the billboard face were under a Burkhart truck except for one (1) broken piece of the billboard face which was leaning against one of the foundation poles.

8. Section 6-2-1(a)(3) provides that it is unlawful to begin any **structural alteration** involved in the repair of an existing **structure** before an improvement location permit has been issued.

9. On December 4, 2006, the Inspector left a notice of violation on the site which stated that an improvement location permit had to be obtained from the Tippecanoe County Building Commission before any repairs could be made to the damaged billboard.

10. After receiving the photographs of the site from the Inspector, the Building Commissioner contacted the staff of the Area Plan Commission and discovered that the site of the billboard was zoned Agricultural Wooded (AW).

11. The Unified Zoning Ordinance (“UZO”) for Tippecanoe County in Section 1-10-2 defines an **Outdoor Advertising Sign** as follows:

A **sign** which is a **primary use**, placed for the purposes of conveying information, knowledge or ideas to the public about a subject unrelated to the **lot** on which it is located.

12. The UZO in Section 1-10-2 defines a **Sign** as follows:

A device, fixture, placard, or **structure** that uses any color, form, graphic, illumination, symbol, or writing to advertise, announce the purpose of, or identify the purpose of a person or entity, or to communicate information of any kind to the public.

13. The UZO in Section 1-10-2 defines a **Structure** as follows:

Anything constructed or erected that requires that requires location on or in the ground or attachments to something having a location in or on the ground.

14. Section 3-2-10 of the UZO states that an **Outdoor Advertising Sign** is only permitted as a use in a General Business or Industrial zone.

15. The billboard in question in this proceeding has been located on the site since before the enactment of the UZO.

16. At the time that the UZO was enacted the billboard in question in this proceeding lawfully existed.

17. The UZO in Section 1-10-2 defines a **Nonconforming Use** as follows:

A **primary use** of a **structure** or **lot** which is not permitted in 3-2 below to be operated in the **zone** in which it is located, and which otherwise lawfully existed at the time applicable portion of 3-2 became effective.

18. Section 5-1-1(a) of the UZO states:

**Nonconforming uses, mobile homes, mobile home parks, lots and structures and noncomplying uses** were lawful **uses, mobile homes, lots and structures** before this ordinance became effective or amended, but now they either

- (1) are prohibited in the **zone** in which they are located; or
- (2) fail to meet current regulations or restrictions under this ordinance or its amendments;
- (3) or both.

19. Section 5-1-1(c) of the UZO states:

It is the intent of this section:

- (1) to permit **nonconforming uses, mobile homes, and signs** to continue until they are removed or cease operation, but not to permit their expansion, and
- (2) to permit **nonconforming lots and structures and noncomplying uses** to continue until they are removed, and to permit their expansion but only if that expansion is conforming and complying.

20. Section 5-1-2(c) of the UZO states:

Except for 5-1-4 below, an otherwise lawful **primary use** made a **nonconforming use** by this ordinance or an amendment to it, may be continued so long as it remains otherwise lawful, if:

- (1) the land area of the **use** and/or the cubic contents of its structure are not increased beyond what they were at the time this ordinance or its amendment became effective;
- (2) it is moved neither in whole nor in part to any portion of its **lot** other than that which it occupied at the time this ordinance or its amendment became effective;
- (3) no additional **structure** serving the **nonconforming use** is erected, other than is permitted in 5-1-5-b below;
- (4) no additional or larger **signs** are erected which are intended to be seen from off the premises; and
- (5) the **nonconforming use** is not **abandoned** for more than 1 year, except when government action impedes access to the premises. If a **nonconforming use** has been **abandoned** for more than 1 year, any subsequent **use** of that land shall conform to the requirements of this ordinance.

21. Section 5-1-2(d) of the UZO states:

When a **nonconforming use** is damaged by any means to the extent that repairs would cost more than 50% of the replacement cost of that use, the **nonconforming use** shall no longer be permitted.

22. After reviewing the photographs taken on December 4, 2006, which showed the remains of the billboard, and the applicable provisions of the UZO, the Building Commissioner determined that the cost to repair the damaged billboard would be more than fifty percent (50%) of the replacement cost of the billboard as it existed before being damaged.

23. Having made this determination, the Building Commissioner notified Burkhart that the billboard could not be repaired under the provisions of the UZO.

24. The Building Commissioner has twenty-two (22) years experience in the construction industry and is responsible for the issuance of all improvement location permits in unincorporated Tippecanoe County.

25. In issuing improvement location permits, the Building Commissioner reviews the estimated construction costs for building projects in Tippecanoe County.

26. On December 19, 2006, the Inspector again visited the site.

27. At the time of his visit on December 19, 2006, the Inspector again took photographs of the remains of the billboard.

28. These photographs show that on December 19, 2006, the two (2) foundation poles which had been noticeably leaning in the photographs taken on December 4, 2006, were now straight.

29. These photographs also show that the work platform which had been noticeably slanted in the photographs taken on December 4, 2006, was now level and straight.

30. These photographs also show that the notice of violation that was left on December 4, 2006, was still nailed to one of the foundation poles.

31. Burkhart did not apply for an improvement location permit to make any repairs to the damaged billboard.

32. Burkhart's employee, Mr. Collison, testified that no one from Burkhart had done any work to repair the damaged billboard or to straighten the foundation poles or to level the work platform since December 4, 2006.

33. Mr. Collison testified that after the remains of the billboard face were cut away from the foundation poles, the foundation poles began to straighten on their own.

34. Mr. Collison also testified that he parked his Burkhart truck on the remains of the billboard face to keep them from blowing away.

35. In the photographs taken on December 4, 2006, the remains of the billboard face appear to be under the Burkhart truck as testified by Mr. Collison with the exception of one (1) piece which appears to be leaning against one (1) of the foundation poles.

36. In the photographs taken on December 4, 2006, no portion of the billboard face appears to be attached above the remains of the work platform where the billboard face would have originally been attached.

37. Mr. Collison also testified that the wind or the muddy ground may have caused the foundation poles to straighten and the work platform to become level.

38. On December 26, 2006, Burkhart timely appealed the decision of the Building Commissioner to the Board of Zoning Appeals.

39. On February 28, 2007, Burkhart's appeal was presented to the Board of Zoning Appeals.

40. According to Robert S. Miller, Burkhart's Executive Vice President and General Manager, the cost to replace the damaged billboard with a modern steel monopole billboard is \$8,490.00.

41. According to Mr. Miller, the cost to replace the damaged billboard as it existed prior to being damaged would include \$1,000.00 for concrete, \$600.0 for backhoe labor, and \$1,280.00 for general labor plus the cost of scrap materials that Burkhart had on hand.

42. Burkhart did not offer any evidence as to the cost of using new material to replace the damaged billboard.

43. Mr. Terry O'Brien, Burkhart's leasing manager, admitted that Burkhart did not get a quote to build a billboard just like the damaged billboard with new materials.

44. The cost of repairing the damaged billboard would include the same concrete, backhoe labor, and general labor costs as stated by Mr. Miller for repairing the billboard.

45. The cost to repair the damaged billboard is more than 50% of the replacement cost for the billboard as it existed prior to being damaged.

## CONCLUSIONS OF LAW

1. The site of the billboard in question in this proceeding is subject to the provisions of the UZO.
2. The billboard in question in this proceeding was a **Structure** as defined by the UZO.
3. The billboard in question in this proceeding was a **Sign** as defined by the UZO.
4. The billboard in question in this proceeding was an **Outdoor Advertising Sign** as defined by the UZO.
5. The billboard in question in this proceeding was a nonconforming use as defined by the UZO.
6. As a nonconforming use, the size (or cubic content) of the billboard structure above and in the ground cannot be increased.
7. Because the damaged billboard was a nonconforming use, no additional structure can be added to the damaged billboard.
8. The monopole steel structure billboard used by Burkhart to establish the replacement cost for the damaged billboard could not be legally erected to replace the damaged billboard under the provisions of the UZO.
9. The replacement costs submitted by Burkhart do not reflect the costs of replacing the damaged billboard with a billboard allowable under the provisions of the UZO.
10. Burkhart failed to offer any evidence on the cost of replacing the damaged billboard with a billboard allowable under the provisions of the UZO.

11. The repairs which Burkhart proposes to make to the damaged billboard include the addition of a concrete structure in the ground.

12. The additional concrete structure which Burkhart has stated will be used to repair the damaged billboard is not legally allowable under the provisions of the UZO.

13. Burkhart failed to offer any evidence that the damaged billboard can be repaired to a safe condition without an additional concrete support structure.

14. The Building Commissioner is qualified to make a determination as to the replacement and repair costs for the billboard in question in this proceeding based upon his experience and general knowledge of construction costs.

15. The determination of the Building Commissioner that the cost to repair the damaged billboard was more than fifty percent (50%) of the cost to replace the damaged billboard was based upon his experience and general knowledge of construction costs.

16. The determination of the Building Commissioner that the cost to repair the damaged billboard was more than fifty percent (50%) of the cost to replace the damaged billboard was not arbitrary, capricious, or illegal.

17. The evidence presented by Burkhart is insufficient to show that the cost to repair the damaged billboard is less than fifty percent (50%) of the cost to replace the damaged billboard with a billboard build with new materials like the damaged billboard.

18. The determination by the Building Commissioner that the costs of repairing the damaged billboard are more than fifty percent (50%) of the replacement cost of the damaged billboard should be upheld.

19. The damaged billboard cannot be repaired under the provisions of the UZO.



20. As to the testimony offered by Burkhart that the wind or muddy ground caused the foundation poles for the damaged billboard to straighten and level the work platform, such testimony is not found to be credible.

21. The testimony that Burkhart did no work to repair the damaged billboard is contrary to the photographic evidence which shows that sometime between December 4, 2006, and December 19, 2006, the foundation poles for the damaged billboard were straightened and the work platform was leveled.

## **DECISION**

Based upon the foregoing Findings Of Fact and Conclusions Of Law, the Area Board of Zoning Appeals of Tippecanoe County hereby affirms the decision of the Building Commissioner.

Entered: \_\_\_\_\_, 2007

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Jean Hall, President

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Steve Clevenger

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Edward J. Weast

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